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Winter 2009

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*Recognition of Overseas Same Sex Marriages: A Matter of Equality and Sound
Statutory interpretation*

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Introduction

Worldwide the relevancy of marriage is undisputed. Every country in the world has the legal institution of marriage in one form or another. The Court of Appeal of Ontario, Canada, in assessing the relevance of marriage and same sex couples stated that: “the benefits of marriage cannot be viewed in purely economic terms. The societal significance surrounding the institution of marriage cannot be overemphasized.” (*Halpern v. Canada (Attorney General)* 65 O.R. (3rd) 161 [136]). Clearly, access to the institution of marriage is indeed more than economics benefits. Further, the availability of marriage to same-sex couples in eight jurisdictions (four European countries – Netherlands, Belgium, Spain and Norway – South Africa, Canada and Massachusetts, California and Connecticut in the United States of America) (all together referred to as the ‘Eight Jurisdictions’) exerts pressure on courts to consider the substance and ethical dimension of marriage across borders. The following analysis focuses on the legal and ethical problems that exclusion of same sex couples from marriage generates in relation to equality and individual freedoms in a democratic society; in particular, in relation to the recognition of

overseas same sex marriages in jurisdictions where, such as the U.K., same sex marriage is not yet possible. Part I analyses the legal recognition of overseas same sex marriages under English law by looking into the operation of principles of international private law. Part II focuses on the impact of the Civil Partnership Act 2004 ('CPA') in the operation of these principles.

Part I: Legal Dimension & Common Law

The validity of an overseas marriage does not require an assessment of whether the marriage could have been celebrated under English law in order to recognise its validity. Conversely, the task of the court is to assess whether to recognize the validity and, consequently, to give effect to the consequences flowing from an act (i.e. marriage) that has been sanctioned by a foreign state under the law of that state (Norrie 2003: 147). In this exercise, the court first must assess whether the marriage satisfies the test of formal validity (i.e. how the marriage should have been celebrated in order for it to be valid *urbi et orbe*). It has been settled since 1752 in English law that the formalities of marriage are governed by the *lex loci celebrationis*; there is no exception under English law to this. (*Scrimshire v. Scrimshire* (1752) 2 Hagg. Con 395; *Berthiaume v. Dastous* [1930] A.C. 79; and Dicey and Morris 2000: ch 17). Additionally, the marriage must satisfy the test of essential validity (i.e. whether the parties to the marriage are legally able to get married). There are two theories: dual domicile test, i.e. the law of the antenuptial domicile of the parties determines the capacity of the parties to marry (Dicey and Morris 2000: 671), and intended domicile test, i.e. the law that determines its validity is that of the jurisdiction where the couple intends to reside (Cheshire and North 1999: 722). The dual domicile test is the one

often preferred in the UK (*Brook v. Brook* (1861) 9 HLC 193 and Law Commission 1987: [3.36]). It is narrower as it requires that both partners meet the requirements to marry both in the domicile where the marriage is celebrated and in their pre-nuptial domicile. Therefore, whilst a same sex couple from any of the Eight Jurisdictions would easily pass this test, a couple from the U.K. who marries abroad would not (*Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam) [16]).¹

It follows from here that under principles of international private law enshrined in English law, a same sex marriage between nationals of the Eight Jurisdictions ought to be as valid as a heterosexual marriage, unless the court finds a same sex marriage as a matter of public policy too “offensive to the conscience of the English court.” (*Cheni v. Cheni* [1965] P 85, 99). The scope for discretion to deny giving effect to an overseas marriage in England set up in this case is *that the courts of the UK will exceptionally refuse to give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give recognition and effect would be so unconscionable ... whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law ... the court will seek to exercise common sense, good manners and a reasonable tolerance. (ibid).*

The issue is to ascertain what amounts to “so unconscionable and offensive to the conscience of the English court” (*ibid*) particularly when this has to be ascertained with “common sense, good manners and a reasonable tolerance” (*ibid*). It is in case law where we need to search for guidance to apply this test. In *Mohamed v Knott* [1969] 1 QB 1, the parties were Nigerian Muslims married in Nigeria (he was in his twenties and she was thirteen years old). The marriage was a valid marriage according to the Muslim law of their domicile in Nigeria. The couple came to

London and, upon arrival, the issue was whether they had a valid marriage and, if not, whether the girl was exposed to moral danger and was the victim of a criminal offence (statutory rape). The Magistrate court rejected the validity of the marriage, placed the girl in social housing and placed the man in custody. The court concluded: “a continuance of such an association notwithstanding the marriage, would be repugnant to any decent minded English man or woman. Our decision reflects that repugnance.” (*ibid.*, p. 15) On appeal, the Queen’s Bench Division held that the marriage was valid under English law (*ibid.*). Secondly, it rejected that the girl was in moral danger and victim of statutory rape “merely because she carried out her wifely duties.” (*ibid.*, p. 17).

This recognition is especially relevant because in the instant case had the marriage occurred in the U.K., it would not only be void (the girl was under age), but its consummation would have amounted to a criminal offence. In light of this case, it seems sound policy, therefore, to conclude that when a same sex couple in similar circumstances (e.g. two Canadian men who marry in Canada) applies for the recognition of their marriage in the U.K., the court ought to follow this precedent and recognise the validity of the marriage. This is particularly so because of mere logical and rational reasons. Logical application of settled principles of private international law shows that under a positivist assessment,² a same sex marriage of nationals of any of the Eight Jurisdictions ought to pass both the formal and essential validity test. Rationality seems to indicate that it would be absurd for a court, given the decision in *Mohamed v. Knott* [1969] 1 QB, to deny the validity of a same sex marriage under the discretionary public policy assessment (i.e. *Cheni v Cheni* [1965] P 85). This is simply because in *Mohamed v. Knott*, the court set the threshold of what constitutes offensive to the conscience of the court; hence, it endorsed the validity of a marriage

whose consummation, had it not been for the valid marriage, would have constituted a criminal offence (i.e. statutory rape). Arguably, an English court would struggle now to justify that a same sex marriage, whose consummation cannot constitute a criminal offense, is nevertheless offensive enough for the conscience of the court as to prevent the recognition of the validity of the marriage. However, the question remains as to whether the CPA supersedes the operation of principles of international private law.

Part II: Inadequacy of current law & the ethical dimension

The accepted understanding is that the CPA characterises overseas same sex relationships as civil partnerships and this characterisation applies both to overseas same-sex civil partnerships and to overseas same-sex marriages (CPA Sections 212(1), 213(2), 214 and Schedule 20; *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) and Norrie 2006: 137). The first question relates to whether this characterisation supersedes or complements common law rules of recognition of overseas same sex marriages.

Characterization

Characterisation is the exercise performed by a court when it hears a case in which the laws of different jurisdictions are likely to apply to an issue in dispute. The court has to place the specific issue into its correct legal category (i.e. characterisation) before selecting the proper law (Morris 2005: 490). If one were to accept the understanding that the CPA substitutes the function of the court by providing it with a characterisation of overseas same sex relationships (whether they are civil unions or

marriages) as civil partnerships (*Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) and Norrie 2006: 137), then one also has to accept that, for the purpose of characterisation, the court applies the *lex fori*.³ However, the problem is that the court may decide that the *lex causae* should apply (e.g. Canada)⁴ or follow an intermediate analytical approach⁵ to characterise the same sex relation. Case law in England and relevant doctrinal discussions (Allarousse 1991:494) do not shed any light on which of these three approaches is preferable, but they demonstrate that characterisation needs to be kept flexible. However, flexibility cannot be maintained if courts are dogmatic in the way they approach a conflict of characterisation (e.g. by relying on *lex fori*) without questioning the policy considerations which underlie the court's own conflict rules of international private law (Dicey 2000:32).

A flexible approach

Parliament in the UK is very well aware of the effects and consequences of principles of international private law. For instance, in passing the Private International Law (Miscellaneous Provisions) Act 1995 section 10, it made very clear that the old common law rules were abolished in so far they contradict the Act itself. The lack of such a clear and explicit intention in the CPA is arguably a sign that the principles of international private law are still operative and the CPA has not superseded them.

The question is therefore what distinctive function the characterisation of the CPA and the principles of international private law fulfil.

Under the principles of international private law, a same sex couple of nationals of any of the Eight Jurisdictions should have their marriage recognised. However, if the couple were nationals from other jurisdictions, e.g. the U.K., common law does not

help. The CPA then fills a gap in the law (by recognising the validity of an overseas marriage, albeit as a civil union, which otherwise would have not been recognised under common law).⁶ As a matter of statutory interpretation, this is a flexible and sound reading of the CPA. An alternative reading (i.e. the CPA supersedes common law) would lead to the absurd result (arguably discriminatory on grounds of sexual orientation) that a court would be forced by common law to recognise the validity of a different sex marriage whose consummation amounts to a criminal offence, i.e. *Mohamed v Knott* [1969] 1 QB 1, yet to reject the validity of a same sex marriage, albeit to recognise it as a civil partnership, whose consummation does not constitute any criminal offence. If the intention nevertheless is that the CPA characterise all overseas same-sex relationships as civil partnerships, a more fundamental question arises, namely whether this characterisation amounts to undue discrimination on grounds of sexual orientation.

The ethical dilemma

One of the justifications to exclude same sex couples from marriage is what is referred to as the will of the majority in a democratic society. This justification conflicts with the ethical ethos of a democratic society in the Aristotelian definition of democracy, as opposed to demagogy, by undermining freedoms and equality of a minority group without further justification than the will of the majority. The second is less obvious and paradoxically arises only when a solution is brought about to avoid exclusion from marriage, but in the form of an alternative institute (e.g. civil partnership). The ethical dimension here relates to the segregating aspect of the civil partnership. In fact, the goodwill of recognising same sex relationships as if they were

marriage in all, but name (e.g. U.K.)⁷ not only segregates, but it arguably encourages discrimination because this “[e]xclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships.” (*Halpern v. Canada (Attorney General)* 65 O.R. (3rd) 161 [107]). It becomes necessary to revisit the concepts underlying the values of equality and individual freedoms as understood by classical and modern liberalism and to assess how excluding same sex couples from marriage undermines these values.

Classical v Modern Liberalism

Classical liberal theories have consistently argued for a laissez-faire state of affairs (Mill 1965:937-9 and 944). This traditionally meant that there is a neutral authority allowing rational individuals to be responsible for their own actions (*ibid.*, p 938). Under this approach, individuals are free to choose their own way of life, provided that no harm is caused to third parties. Further, the state should not make preference in relation to a particular group. Therefore, state intervention (eg positive discrimination) based on giving some individuals a protected position should be avoided as it breaches their position of equality and, from an economic point of view, it “does not reduce the amount of natural uncertainty in the world; indeed, it increases [the cost] and amount of uncertainty - natural and political - that all individuals have to bear ... for no additional compensation.” (Epstein 1999:293).⁸

Modern liberalism changes the paradigms from where the theory departs. Equality and individual freedoms are essential (Dworkin 1985) and, if societal situations are level, the state should not intervene since it is paramount that the state treats its

citizens as equals. Conversely, the state must intervene to make better off those who are worse off in the society (Rawls 1972:60-2). State's abstention is therefore a condition that derives precisely from equality (and not vice versa as with classical liberalism) and, therefore, state's intervention is acceptable to the extent that it is necessary to promote equality (ie positive discrimination, judicial activism, etc).

However, regardless of the fact that under the classical approach to liberalism, one may struggle to justify positive discrimination, negative discrimination cannot find much solace in any version of liberalism either. Equality is under the classical approach to liberalism a condition that derives precisely from state's abstention unless some compelling necessity requires the state to break its neutrality and consequently affect the balance within a society. In a dissenting opinion in *Lawrence and Garner v Texas* 539 US 558 (2003), Justice Scalia tried to explain (the Court did not share his view) why state intervention is necessary to deter men from homosexual intercourse (ie constitutionality of sodomy laws): *many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as children in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive (ibid., p 602).*

Mere *belief*, no matter how enshrined this is in the society, cannot justify in a democratic society a compelling necessity to break state neutrality in order to endorse a negative policy that discriminates against a group of the society. This is historically unwise and logically unsound. The democratic Germany of the Weimar Republic elected a Parliament that *believed* in the purity of the Arian race and *believed* also that minority groups such as Gypsies, Jews and homosexuals were responsible of the

economic debacle of the German economy. It was this *belief* that served as legal scaffolding to support the Holocaust. Further, there is a more fundamental flaw in Scalia's argument; it can only work if homosexuality were contagion. Thus, the possibility of homosexuality spreading is what would provide with grounds to have legislation in order to protect the straight population from such a disease. However, there is still a problem with this line of thought and the legislation that Scalia is defending: sodomy laws do not punish public affection between two men (ie a hug, a kiss or even a holding hands), but they punish sexual intercourse (ie oral or anal penetration) between two consenting adults in the privacy of their home.⁹ Scalia does not explain (I would argue that he cannot without falling in to an even more absurd syllogism) how straight men will be transmitted homosexuality by the sexual practices of two homosexual men in the privacy of their home. The fact is that sexual orientation is an inherently personal characteristic, which is unchangeable (or as it has been argued suppressible at a high personal cost).¹⁰ The sexual orientation of a person is so integral an aspect of their identity that the courts have already concluded that "it is not appropriate to require [a person] to repudiate or change [his/her] sexual orientation in order to avoid discriminatory treatment." (*Re Marriage Cases* 43 Cal.4th 757, 842). If an individual's sexual orientation is immutable and not spreadable classical liberalism cannot justify negative interference with individual's freedom. Further, under the modern liberal approach, the state is expected to intervene to redress inequality. The Constitutional Court in South Africa used this approach to justify judicial activism in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] ZACC 15 where the court stroke down common-law and statutory provisions banning sexual activity between men: *The impact of discrimination on gays and lesbians is rendered more serious ... by the fact that they*

are a political minority not able on their own to use political power to secure favourable legislation They are ... almost exclusively reliant on the Bill of Rights for their protection. ... Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. (ibid., [25]).

If the punishment of a group of people within a society on grounds of inherently personal characteristics of the group (race, religion, sexual orientation etc) finds no justification under classical or modern liberalism, it could be argued that the exclusion of certain type of couples from the institution of marriage would find no justification either. Indeed, it would constitute an infringement of individual freedoms and an undue negative state's intervention (under the classical approach) and a violation of equality (under the modern approach). This argument was indeed the one that the United State Supreme Court used in 1967 in *Loving v Virginia* 388 US 1 (1967) to strike down state legislation that prohibited interracial marriage:¹¹ *Marriage is one of the 'basic civil rights of man,' (citations omitted)... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality ... is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State. (ibid., p 12).*

If one were to make the intellectual effort of substituting sexual orientation for race in these lines, the result would speak by itself.¹² The next obvious question however is

whether sexual orientation is such a fundamental aspect of a person's life as to deserve a status similar to race.

Discrimination on grounds of Sexual Orientation

The Supreme Court of Canada dealt with the question of sexual orientation and discriminatory legislation in 1995 when it held unanimously that sexual orientation is an inherently and unchangeable personal characteristic protected by the constitution and analogous to the enumerated grounds (*Egan v. Canada* [1995] 2 S.C.R. 513, 514). The court also explained, using a modern liberal approach, why state intervention was required to protect it: "homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage." (*ibid.*, p 602).

The European Court of Human Rights also developed a body of case law establishing a strict justification test for cases involving discrimination based on sexual orientation by drawing analogies between sexual orientation and race, religion and sex. In *Smith and Grady v. United Kingdom* ((Apps nos. 33985/96 and 33986/96) ECHR 27 September 1999), the Court held that the dismissal of all homosexual members of the armed forces could not be justified by the hostility of their heterosexual colleagues towards them. The Court stated that "these negative attitudes cannot ... amount to sufficient justification for the interferences with the applicants' rights ..., any more than similar negative attitudes towards those of a different race, origin or colour." (*ibid.*, [97]).

In the United States, the Supreme Court of California has recently articulated a similar modern liberal approach in *Re Marriage Cases* 43 Cal.4th 757 (2008) by stating that “lesbians and gay men . . . share a history of persecution comparable to that of Blacks and women . . . [o]utside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ . . . , and such ‘immediate and severe opprobrium’ . . . , as homosexuals.” (*ibid.*, p 841). The Court therefore concluded that: “sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment . . . it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification.” (*ibid.*, p 844).

This analysis shows that courts, at both the international and national levels, have repeatedly recognized that discrimination on the basis of sexual orientation is just as serious and unacceptable as discrimination based on race, religion or sex, and that it violates provisions of international human rights treaties and national constitutions referring to "privacy" or "private life", or "equal protection" or "non-discrimination", even though these provisions do not expressly mention sexual orientation. The question that remains is whether the democratic process can nevertheless justify exclusion from marriage for no other reason than sexual orientation.

Marriage and the enforcement of liberal principles

The courts in Canada, South Africa, and three states of the United States of America have already found that the denial of marriage to same sex couples and segregational

policies of recognising same sex relationships as if they were marriage in all, but name, are unacceptable on grounds of equality and individual freedoms.

Courts in Canada in two occasions ruled against both the exclusion and segregation from marriage (*Halpern v. Canada (Attorney General)* 65 O.R. (3rd) 161 and *EGALE Canada Inc. v. Canada (Attorney General)* 225 D.L.R. (4th) 472). In *Halpern*, the court, relying on a classical liberal approach, concluded: “same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding [non-economic] benefits ... available only to married persons, cannot be overlooked.” (*ibid.*, [107]).¹³

In relation to the separate but equal approach, the court concluded that it was not sufficient because the Canadian Charter, Section 15[1], guarantees more than equal access to economic benefits (*ibid.*, [106]). In *EGALE Canada Inc. v. Canada (Attorney General)* 225 D.L.R. (4th) 472, the British Columbia Court of Appeal concluded that the only suitable remedy was to allow same-sex couples to marry because “any other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality.” (*ibid.*, [156]).¹⁴

The Supreme Judicial Court of Massachusetts followed this line of argument in November 2003 in *Goodridge v. Department of Public Health* 798 N.E.2d 941. The court found that the denial of marriage to same sex couples constitutes an undue discrimination rooted in prejudice (*ibid.*, p. 968) and that it unduly interferes with individual freedoms and equality as it “confer[s] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.” (*ibid.*, p. 962). In

February 2004, the same court concluded in relation to the segregational policy that civil unions were not an adequate substitute (*Re the Opinions of the Justices to the Senate*, 802 N.E.2d 565, 577) highlighting that the question was “not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens ... and withhold from that class the right to participate in the institution of civil marriage, along with its ... tangible and intangible ... benefits ...” (*ibid.*, p. 571). Massachusetts was followed by the Constitutional Court of South Africa in *Minister of Home Affairs v. Fourie* [2005] ZACC 19 (1 December 2005), the Supreme Court of California (USA) in *Re Marriage Cases* 43 Cal.4th 757 (15 May 2008) and recently the Supreme Court of Connecticut (USA) in *Kerrigan v Commissioner of Public Health* 957 A.2d 407 (28 October 2008).

One could derive from these analyses, if one were to be consistent with classical liberal theory, that the state should not impede rational individuals from being responsible for their own actions and from being free to choose their own partner regardless the sex of the partner. It is a matter of common sense that no western secular and liberal society can justify exclusion of atheist, Jewish or Muslim, from marriage because of the religion of the couple. This is so even though religion is mainly a cultural consequence, which could potentially be changed. In the same way, a consistent application of classical liberal approach cannot justify exclusion from marriage on grounds of race or sexual orientation particularly given that race and sexual orientation are neither cultural or fashion nor can they be changed.

Furthermore, a modern liberal approach justifies judicial activism to redress inequality and restore the individual freedoms; the Supreme Court of Connecticut explained:

Interpreting our state constitutional provisions in accordance with firmly established

equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. ... [S]ame sex couples cannot be denied the freedom to marry. (ibid., p. 482).

Hence, state's intervention is acceptable to the extent that it is necessary to promote equality whether this is in terms of benefits (when access to them is denied) or whether this is merely in terms of name (when legislation recognises same sex relationships as if they were marriage in all, but name).¹⁵

Conclusion

The right of society to decide through the democratic process who is entitled to enjoy the benefit of marriage is not disputed here. It is disputed however whether the democratic process can possibly segregate a sector of the population without due justification from what is deemed a fundamental institution of society. This paper has showed that marriage is about more than just economic benefits and legal rights. Marriage is an institution of historical, cultural and social significance. Differential treatment is therefore neither symbolic nor intangible when it singles out a group from marriage because of inherently personal characteristics of the group (be race, religion or sexual orientation).

The accepted understanding that the recognition of overseas same-sex marriages under the CPA as civil partnerships causes no material harm to same sex couples did not find justification under a classical, let alone modern, liberal analysis. In light of this analysis, it can therefore be concluded that although the CPA sought to characterise all overseas same sex marriages as civil partnerships, not only does it fail to override the effect of common law with regard to the recognition of overseas same sex marriages on grounds of sound statutory interpretation, but also on grounds of equality and individual freedoms. This is because, as the analysis in this paper shows, it is unethical to create a new legal status for overseas same sex marriages with the implication of segregating them from the institution of marriage because it cannot be justified under classical and modern liberalism, unless one were to accept Scalia's arguments that some individual's beliefs are more rightful or superior to other individual in a democratic society; hence the distinction is irrational and arbitrary and, as such, it undermines individual's freedom and equality.

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¹ Therefore, the court's reasoning in this case, albeit right in the instant case, is not setting a precedent for future cases.

² Positivism is used here in the sense that Kelsen would use the term: pure law whose validity derives from its sources and not its goodness or badness (Kelsen 1967: 1).

³ In *Ogden v Ogden* [1908] P 46, the validity of a marriage celebrated in the England was questioned in England for lack consent. The issue was whether consent was a matter of substance or form. The court applied the *lex fori* as consent for English law is a matter of formality and the form of marriage is assessed according to the law of the place of celebration.

⁴ In *Re Maldonado's* [1954] P 223, the court characterised the matter as an issue of succession in accordance with the *lex causae* (ie Spanish law) 'for it would be wrong ... to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion'. *ibid.*, p. 231.

⁵ In *Re Cohn* [1945] Ch 5, the court adopted an intermediate position. Under the will of the mother, the daughter was entitled to movables only if she survived her mother; it was not possible to ascertain who died first. Both were German and domiciled in Germany. Under English principles of international private law, succession to movables is governed by the law of the domicile and procedural issues are governed by the *lex fori*. The *lex fori* presumes (ie English law) that the elder dies first; the *lex causae* presumes (ie German law) that both die simultaneously. The court decided that the logical solution was to conclude that both presumptions were substantive; hence, the German presumption applied

⁶ Further, it naturally meets the essence of the dual domicile test as it is applied to different sex married couples (ie prevent fraud to the marriage law of the domicile where the parties are national).

⁷ This is the legal situation in Denmark, Finland, Germany, Hungary (Constitutional Court stroke down the law on 15 December 2008; new legislation is expected during 2009), Iceland, New Zealand, Sweden, Switzerland, U.K., the Australian Capital Territory, Tasmania and Victoria in Australia, and California, Connecticut, New Hampshire, New Jersey, Oregon and Vermont in the USA.

⁸ See also RA Epstein *The Case against Employment Discrimination Law* (Harvard University Press Cambridge 1992) (arguing that individual freedoms should be respected even to the extent that if a group decides to exclude from its membership people because of their gender, ethnic origins or sexual orientation, the state should remain neutral.) The United States Supreme Court took this approach in *Boy Scout of America v Dale* 530 US 640 (2000) (5-4) (reversed and remanded).

⁹ Public sexual intercourse is covered by other criminal laws regardless of whether this is homosexual or heterosexual sex.

¹⁰ The Supreme Court of Canada held unanimously (9-0) in *Egan v. Canada* "... whether or not sexual orientation is based on biological or physiological factors, ... it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs ...". [1995] 2 S.C.R. 513, 528.

¹¹ The first instance court had held that such a law was constitutional on grounds that 'god created the races white, black ... and placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.' *Loving v Virginia* 388 US 1, 3 (1967).

¹² This is precisely one of the main arguments used by the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health* 798 N.E.2d 941: *For ... centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. ... In this case, as in ... Loving [US Supreme Court, 1967], a statute deprives individuals of access to ... the institution of marriage--because of a single trait: skin color in Perez and Loving, sexual orientation here. ... (ibid., p , 958).*

¹³ The Court in *Halpern v. Canada (Attorney General)* 65 O.R. (3rd) 161 also rejected the justification that marriage exists to promote procreation (without the assistance of a third party) (*ibid* at [94]) and also dismissed as speculative any threat to the institution of marriage (*ibid* at [134]).

¹⁴ The court highlighted, using a modern liberal approach that it ‘should not be asked to grant a remedy which makes same-sex couples ‘almost equal’, or to leave it to governments to choose amongst less-than-equal solutions.’ (*EGALE Canada Inc. v. Canada (Attorney General)* 225 D.L.R. (4th) 472 [156]).

¹⁵ The Supreme Court of Connecticut explained: ‘in view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior ... Although [they] ... embody the same legal rights ..., they are by no means ‘equal’. ... Even though ... differential treatment ... may be characterized as symbolic or intangible ... it is no less real than more tangible forms of discrimination, at least when ... [it] singles out a group that historically has been the object of scorn, intolerance, ridicule or worse. ...’ *Kerrigan v Commissioner of Public Health* 957 A.2d 407, 418.